Abdul Ghani Haroon v Ketua Polis Negara and another application (No 2)

HIGH COURT (SHAH ALAM) — CRIMINAL APPLICATIONS NO 44–9 OF 2001 AND 44–10 OF 2001

MOHD HISHAMUDIN J

4 MAY 2001

Criminal Procedure *— Appeal — Right of — Procedural ruling — Decision granting right to appear at hearing of habeas corpus hearing — Whether final decision or direction — Whether appealable — Criminal Procedure Code s 365*

The respondent was the Inspector General of Police, while the applicants were officials of the political party, Parti Keadilan Nasional. The respondent made an oral application for a stay of execution of the ruling of the court on the preliminary issue of whether the applicants have a right to be present at the hearing of their habeas corpus application. The court held that the right to apply to the High Court for a writ of habeas corpus is not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained, and therefore an order was made that the applicants be produced in court. The respondent submitted that as the arrests made were connected with internal security and public order, the production of the applicants in court might attract a large crowd, which might interrupt the smooth running of the court's proceedings. Counsel for the applicants argued that the respondent could not in law apply for a stay of execution pending appeal and that the ruling made was not appealable in the first place.

Held, rejecting the application for a stay of execution:

(1) This oral application for stay must be rejected. There was no right of appeal against the ruling of the court. If there was no right to appeal, then the question of stay pending appeal did not arise (see pp 206I–207A).

(2) The ruling made by the court, regardless whether one calls it a decision or a direction, although it was a decision or direction under s 365 of the Criminal Procedure Code, nevertheless, it was not a *final* decision or direction. It was not a final decision or direction because it was not a decision allowing or disallowing the application for a writ of habeas corpus; nor was it a direction in connection with such decision. It was merely a decision granting the applicants the right to be present at the hearing of their habeas corpus applications and the consequential direction to the respondent for their production in court. It was only a procedural ruling and the ruling did not finally dispose of the application. Therefore, it was not appealable (see pp 207H–208A).

[Bahasa Malaysia summary

Responden adalah Ketua Polis, sementara pemohon-pemohon adalah pegawai-pegawai parti politik, Parti Keadilan Nasional. Responden telah membuat satu permohonan secara lisan untuk satu penggantungan pelaksanaan keputusan mahkamah atas persoalan awal sama ada pemohom-pemohon mempunyai hak untuk hadir di perbicaraan permohonan habeas corpus mereka. Adalah keputusan mahkamah bahawa hak untuk memohon kepada Mahkamah Tinggi untuk satu writ habeas corpus bukan sekadar satu hak di sisi undang-undang tetapi juga satu hak perlembagaan yang sedia ada kepada sesiapa yang mempercayai bahawa beliau telah ditahan secara tidak sah, dan oleh itu satu perintah telah dibuat agar pemohon-pemohon dihadapkan ke mahkamah. Responden telah menghujahkan bahawa memandangkan tangkapan-tangkapan yang telah dibuat berkaitan dengan keselamatan dalam negeri dan ketenteraman awam, pemohon-pemohon yang dihadapkan ke mahkamah akan menarik perhatian orang ramai, yang mungkin akan mengganggu kelancaran perjalanan prosiding mahkamah. Peguam bagi pihak pemohon-pemohon menghujahkan bahawa responden tidak boleh di sisi-undang-undang memohon satu penggantungan pelaksanaan sementara menunggu rayuan dan bahawa keputusan yang dibuat tidak boleh dirayui pada mulanya.

Diputuskan, menolak permohonan satu penggantungan pelaksanaan tersebut:

(1) Permohonan secara lisan untuk penggantungan tersebut mestilah ditolak. Tiada hak untuk membuat rayuan terhadap keputusan mahkamah. Jika tiada hak untuk membuat rayuan, persoalan tentang penggantungan sementara menunggu rayuan tidak timbul (lihat ms 206I–207A).

(2) Keputusan yang dibuat oleh mahkamah, tidak kira sama ada ia dipanggil sebagai satu keputusan atau satu arahan, walaupun ia adalah satu keputusan atau arahan di bawah s 365 Kanun Acara Jenayah, meskipun begitu, ia bukan satu keputusan atau arahan yang *muktamad*. Ia bukan satu keputusan atau arahan yang muktamad kerana ia bukan satu keputusan yang membenarkan atau tidak membenarkan permohonan satu writ habeas corpus; maupun ia satu arahan berkaitan dengan keputusan sedemikian. Ia sekadar satu keputusan membenarkan pemohon-pemohon hak untuk hadir di perbicaraan permohonan-permohonan habeas corpus mereka dan arahan penting kepada responden untuk mereka dihadapkan ke mahkamah. Ia hanya satu keputusan prosedur dan keputusan tersebut tidak menyelesaikan permohonan tersebut akhirnya. Oleh itu, ia tidak boleh dirayu (lihat ms 207H–208A).]

Notes

For cases on right of appeal, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 419–478.

Cases referred to

Minister for Home Affairs, Malaysia & Anor v Karpal Singh (No 2) [1988] 3 MLJ 85 (refd)

Legislation referred to

Criminal Procedure Code ss 365, 374 and 375
Federal Constitution Art 5(2) cl (2)
Internal Security Act 1960 s 73(1)

R Sivarasa (*Kamarul Hisham*, *Kandasamy Palaniandy*, *Saiful Izham* and *Hamidzun Khairuddin* with him) (*Selvam Shamugam & Partners*) for the applicants.

Abdul Wahab bin Mohd and *Abdul Rashid Sudin* (Senior Federal Counsels) for the respondent.

Mohd Hishamudin J:. (On the oral application by the respondent for a stay of execution of the ruling of the court on a preliminary issue: whether the applicants have a right to be present at the hearing of their application)

This is an oral application by the respondent, the Inspector General of Police, Malaysia, for a stay of execution of my ruling which I have just made a moment ago on a preliminary issue to the effect that the applicants in the present habeas corpus proceeding have a constitutional right to be present at the hearing of their habeas corpus application (there is a separate written judgment in respect of that ruling). Encik Abdul Wahab bin Mohd, the Senior Federal Counsel, on behalf of the respondent, informed the court, immediately after I have made the aforesaid ruling, that the respondent intends to appeal against my ruling to the Federal Court pursuant to s 374 of the Criminal Procedure Code ('the CPC'). He orally applies for a stay of execution pursuant to s 311 of the CPC. The learned senior federal counsel submits that the applicants were arrested under the Internal Security Act 1960; that the arrest are connected with internal security and public order; and that the production of the applicants in court might attract a large crowd which might interrupt the smooth running of the court's proceedings.

Encik R Sivarasa, the learned counsel for the applicants, on the other hand, submits that the respondent cannot in law apply for a stay of execution pending appeal. He argues that the ruling that I have just made is not appealable in the first place, relying on s 374 of the *CPC* itself and the interpretation of that provision by the Supreme Court in *Minister for Home Affairs, Malaysia & Anor v Karpal Singh (No 2)* [1988] 3 MLJ 85.

Now, a brief account of the background might be useful. The applicants, En Abdul Ghani Haroon and En Gobalakrishnan a/l Nagappan are officials of the political party, Parti Keadilan Nasional. They have been arrested under s 73(1) of the Internal Security Act 1960 ('the ISA').

The two detainees, have separately applied to this court for a writ of habeas corpus, through Criminal Application 44-9-2001 and Criminal Application 44-10-2001. The applications are made pursuant to s 365 of the CPC (to be read with Art 5(2) of the Federal Constitution). By consent, these two applications have been consolidated and are being heard together.

The common respondent in the applications is the Inspector General of Police.

A few days before the commencement of the hearing on 23 April 2001, the deputy registrar of this court had caused to be issued and served on the respondent a 'notice to produce' so that the applicants could be present at the hearing of their applications. This is the normal practice of this court in all habeas corpus proceedings, regardless of the nature of the detention. But the respondent had failed to comply with the order. The respondent had no intention to disobey the court's order. The position taken by the respondent was that, in law, the applicants have no right to be present at the hearing of their applications.

The applicants contended otherwise.

Thus there was a preliminary issue before this court: In law do the applicants have the right to be present at the hearing of their applications?

Encik Sivarasa for the applicants insisted that they have the right to be present.

The learned Senior Federal Counsels, En Abdul Wahab and En Abdul Rashid Sudin, on the other hand, submit that they have no right.

After hearing the arguments from both sides for several days, I had reserved my decision to today, Friday 4 May; and that decision was delivered a moment ago. In my decision I ruled that, by virtue of cl (2) of art 5 of the Federal Constitution, the right to apply to the High Court for a writ of habeas corpusis not merely a legal right but also a constitutional right available to any person who believes that he has been unlawfully detained. The right being a constitutional right, it should follow that he has every right to be present in court at the hearing of his application. In other words, the right to be present is a constitutional right implicit in cl (2) of art 5.

Accordingly, I made an order that the applicants be produced in court at the continued hearing of this habeas corpus proceeding, and that the deputy registrar of this court shall caused to be issued and served on the respondent a fresh notice to produce.

Now, as I have said earlier, the above ruling led to the immediate oral application for a stay of execution by the respondent.

Having considered the arguments of both sides, in my judgment, this oral application for stay must be rejected.

I accept the contention by En Sivarasa that there is no right of appeal against my ruling. If there is no right to appeal, then the question of stay pending appeal does not arise.

Section 374 of the CPC provides:

> Appeal
>
> 374 Any person aggrieved by any decision or direction of the High Court under this Chapter may appeal to the Federal Court within thirty days from the date of the decision or direction appealed against.

The word 'Chapter' in the above provision refer to Chapter XXXVI of the CPC bearing the title:

> DIRECTIONS OF THE NATURE OF A *HABEAS CORPUS*

Chapter XXXVI begins with s 365 and ends with s 375. Section 365 reads:

> Power of High Court to make certain orders
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> 365 The High Court may whenever it thinks fit direct —
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> (a) That any person who:
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> (i) is detained in any prison within the limits of Malaysia on a warrant of extradition whether under the Extradition Act 1992; or
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> (ii) is alleged to be illegally or improperly detained in public or private custody within the limits of Malaysia
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> be set at liberty;
>
> (b) that any defendant in custody under a writ of attachment be brought before the court to be dealt with according to law.

Now, I am more inclined to regard my ruling as being in the nature of both: it is a decision as well as a direction. But for the purpose of deciding on this oral application for stay, I think, it really does not matter whether one calls the ruling a 'decision' or whether one calls it a 'direction'; or whether one considers the ruling to be having the nature of both.

In *Karpal Singh (No 2)*, the Supreme Court explains the meaning of the phrase 'decision or direction' appearing in s 374. Abdul Hamid Ag LP (as he then was) said (at p 85):

> The words 'decision or direction' under s 374 of the Code clearly must necessarily refer to the *final* decision or direction made under s 365 of the Code. (Emphasis added.)

Thus the Supreme Court has given a qualified meaning to the words 'decision or direction' in s 374. What is appealable is not just any decision or direction under s 365. It has to be a *final* decision or direction. Clearly the ruling that I have made, regardless whether one calls it a decision or a direction, although it is a decision or direction under s 365 of the CPC, nevertheless, it is not a *final* decision or direction. It is not a final decision or direction because it is not a decision allowing or disallowing the application for a writ of habeas corpus; not is it a direction in connection with such decision. It is merely a decision granting the applicants the right to be present at the hearing of their habeas corpus applications and the

consequential direction to the respondent for their production in court. It is only a procedural ruling and the ruling does not finally dispose of the application. Therefore, it is not appealable.

Application rejected.

Reported by Wong Ee Lynn